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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85690391
Applicant	Foamation Inc.
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**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Foamation Inc.

Mark:

Serial No.: 85690391

Filed: July 30, 2012



APPEAL BRIEF

This is an appeal of the refusal to register Applicant's mark comprising "the color yellow/gold and a pattern of pock marks which are circular or oval-shaped depressions applied to the entire surface of the goods in a manner evoking the appearance of cheese."



The Examining Attorney initially refused registration on the ground it is a phantom mark. December 4, 2012 Office Action ("Dec. 2012 Action") at 1-2. The Examining Attorney withdrew the refusal after Applicant explained that it seeks to register a single mark that doesn't contain any changeable elements. Applicant's May 16, 2013 Office Action response ("May 2013 Response"). But, the Examining Attorney then repackaged the phantom mark refusal as several other refusals, all of which are based strictly on the fact that the pock mark pattern in Applicant's mark is not uniform or repeating. July 9, 2013 Office Action ("Jul. 2013 Action") at 2-5. The Examining Attorney's final Office Action explains her refusal to register as follows:

Registration is refused because the applied-for mark, as used on the specimen of record, is solely decorative or ornamental in nature; it does not function as a trademark to identify and distinguish applicant's goods from those of others and to indicate the source of applicant's goods. Moreover, the applied-for mark

appears incapable of functioning as a source-identifier for applicant's goods.

The applied-for mark, as shown on the specimen, is merely ornamental as each of the pock/holes on each specimen shows a different set of pock/holes. There is no indication as to which of the many patterns appearing on the specimens the applicant wishes to register as a trademark. It appears that the applicant is trying to register a concept, and not an actual single mark. The drawing shows a variety of pock/holes many of them different from one another, not constituting a single mark. Therefore, each pock/hole looks different on every goods listed in the application.

Accordingly, the applied-for mark does not constitute a mark and would not be perceived by consumers as a mark but just as a texture feature of the mark.

October 3, 2013 Office Action ("Oct. 2013 Action") at 2 (citations omitted). All of the other issues raised by the Examining Attorney, including the differences between the drawing and specimens and the requirements for additional information and a new drawing, also relate to the pattern of pock marks. Jul. 2013 Action at 3-4; Oct. 2013 Action at 2-3.

For the reasons discussed herein, Applicant respectfully requests that the Board reverse all of the refusals.

A. The Examining Attorney Did not Meet Her Burden of Showing that Applicant's Mark is Ornamental

An examining attorney must make a *prima facie* showing that a mark is merely ornamental. *In re Tire Mart, Inc.*, Serial No. 78292388 at 6 (January 22, 2008) [not precedential] ("The examining attorney bears the burden of making a *prima facie* showing that the mark is merely ornamental, and does not function as a trademark.") Here, the Examining Attorney presented no evidence that Applicant's mark and its placement on the goods, or designs similarly placed, are widely-viewed as mere ornamentation in Applicant's industry. She provided no articles or advertisements showing that consumers would perceive similar designs as merely

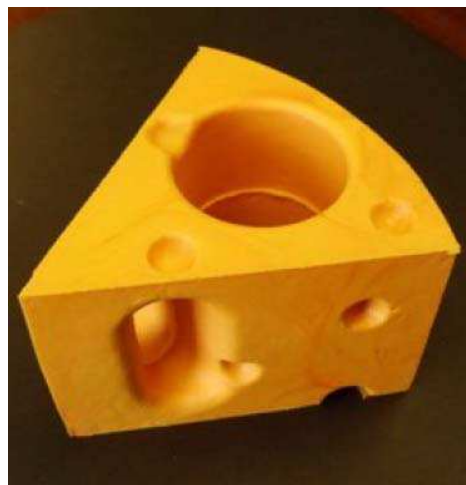
ornamental or decorative. Since there is no evidence or argument of record in support of an ornamental refusal, the Board must reverse it. *Id.* at 10-11.

B. Applicant Does not Seek to Register a Concept or Multiple Marks

The Examining Attorney also suggests that Applicant “is trying to register a concept, and not an actual single mark.” Oct. 2013 Action at 2. Applicant’s mark, unlike ideas or concepts that have been refused registration, does not feature missing or changeable phantom elements. *See, e.g., In re Primo Water Corp.*, 87 USPQ2d 1376 (TTAB 2008) (mark comprising varying, unspecified text or graphic material positioned on a water bottle held an unregistrable concept); *In re Upper Deck Co.*, 59 USPQ2d 1688 (TTAB 2001) (mark comprising a hologram varying in shape, size and content positioned on a trading card held an unregistrable concept); *In re Elvis Presley Enters.*, 50 USPQ2d 1632 (TTAB 1999) (mark comprising all likenesses and images of one particular person in all possible manners of presentation without limitation as to age, manner of dress or pose held an unregistrable concept). If the applied-for mark did incorporate phantom elements, why did the Examining Attorney withdraw her phantom mark refusal?

Nor is Applicant trying to register multiple marks. The question presented in a multiple mark refusal “is whether the specimens of use accurately depict a single, unitary mark engendering a unique and distinct commercial impression, or whether the specimens depict two separate marks.” *In re Supreme Steel Framing System Association, Inc.*, 105 USPQ2d 1385, 1387 (TTAB 2012). Consumers encountering Applicant’s goods will see a single trademark that creates a unique and distinct impression: cheese. *See* Applicant’s specimens of use filed July 30, 2012, examples of which are shown below.







That the pock marks are not in a uniform pattern does not mean consumers will see multiple marks when viewing these goods. Applicant's specimens show how the average purchaser will encounter the mark under normal marketing conditions and therefore suggest the likely perception of the average purchaser to this display of the mark. *Id.* The specimens show that all of Applicant's products share the distinct and consistent appearance of the color combined with the cheese-like pock marks/indentations. As can be seen by viewing multiple products that incorporate the mark, only one mark is disclosed, and therefore, the Examining Attorney's refusal is improper.

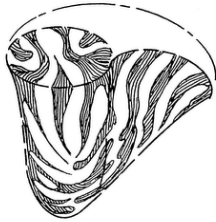
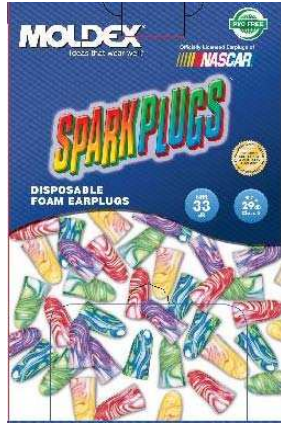



Applicant's mark as described in its application and shown in its drawing fulfills the primary purpose of registration: to provide notice to potential users of the same or a confusingly similar mark. *International Flavors and Fragrances Inc.*, 51 USPQ2d 1513, 1517 (Fed. Cir. 1999). To serve this purpose, a mark must accurately reflect the way it is used in commerce so that someone who searches the registers of the USPTO for the mark, or a similar mark, will locate the registered mark. *Id.* Applicant's mark description and drawing accurately reflect the way it is always used in commerce. No element is subject to change. Anyone who searches the registry for the mark, or a similar mark, will easily locate it. In fact, the Examining Attorney stated that "[t]he Office records have been searched and there are no similar registered or



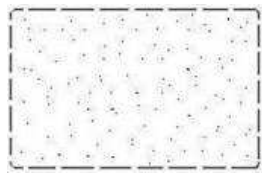



pending marks that would bar registration under Trademark Act Section 2(d), 15 U.S.C.

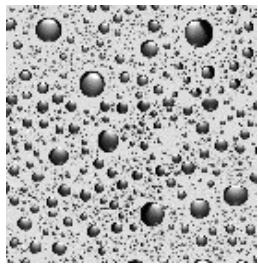

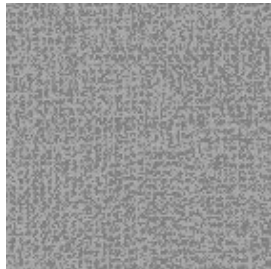

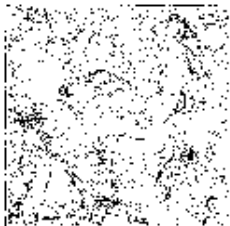

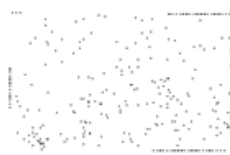
§1052(d),” demonstrating that a search for conflicting marks is possible. Dec. 2012 Action at 3.






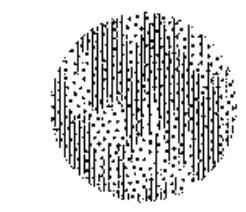
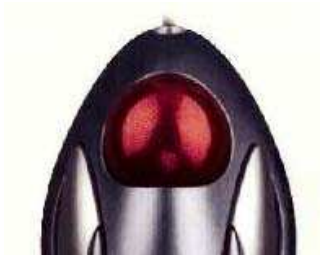
C. The Office Consistently Registers Similar Marks

There are many registered marks that, like Applicant’s mark, feature an inconsistent design patterns applied to the surface of goods.

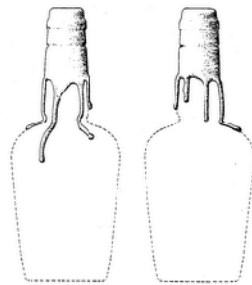
Reg. No.	Drawing	Description	Specimen
2680402 2022674		The mark consists of randomly dispersed longitudinal color streaks and swirls.	 
3942342		The mark consists of the colors green, tan, and brown as applied to the visible surface of the goods swirled together to create a camouflage effect.	

Reg. No.	Drawing	Description	Specimen
3049101		The mark consists of contrasting colors blended <u>randomly</u> together to form the appearance of a fanciful design on the surface of a paintball.	
3514395		The mark consists of a <u>random</u> speckled pattern presented on a surface of sheet material used for plastic cards.	
3373045		The body of the purse is <u>randomly</u> colored brown, black, and green in a camouflage pattern.	

Reg. No.	Drawing	Description	Specimen
3776465		The mark consists of a <u>randomly</u> oriented pattern of <u>differently</u> sized bubbles on the surface of the product.	
3714288		The mark consists of a simulated burlap design comprised of a <u>random</u> pattern of darker <u>irregular</u> shapes against a lighter solid background giving the illusion of a woven texture which completely covers the outside of cigar and tobacco product packaging.	
2710824		The mark consists of a <u>random</u> marbled design pattern on the goods, namely, the mark consists of a white background infused with the color blue in <u>varying</u> swirling patterns so as to create a marble-like visual effect.	
2664704		The mark consists of yellow phosphorescent speckles embedded in a <u>random</u> pattern on the goods.	Unavailable

Reg. No.	Drawing	Description	Specimen
3314980		The colors blue and white appear in random width horizontal striping across the glove. The mark consists of the colors blue and white in a horizontal striping design throughout the entire good (glove) except for the bottom edging.	 <p>See also http://www.ssgrippinggloves.com/style-0400-blue-streak-flex-fit-roper:</p> 
2719722		The mark consists of the configuration of a bottle with random ridges running through the length of the bottle.	
2307488		The mark consists of a dark red color with random black stippling as applied to the entire surface of the goods.	

See May 2013 Response, Ex. A. Maker's Mark Distillery, Inc. owns U.S. Registration No. 1370465 for “a wax-like coating covering the cap of the bottle and trickling down the neck of the bottle in a **freeform irregular** pattern,” which the 6th Circuit recently said “is an extremely strong mark.” *Maker's Mark Distillery, Inc. v. Diageo N. Am.*, 102 USPQ2d 1693, 1700 (6th Cir. 2012).



These registrations demonstrate the PTO's history of allowing registration of irregular/inconsistent patterns applied to product surfaces. Applicant's mark is no different than any of these marks. It is inconsequential that Applicant's pock mark pattern is not uniform or repeating and that it should not be the basis for the Examining Attorney's various refusals. Applicant therefore respectfully requests that they be reversed and that its mark be approved for publication.

Respectfully submitted,

FOAMATION INC.

By its Attorneys,

Date: February 18, 2014

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5. *In re Upper Deck Co.*, 59 USPQ2d 1688 (TTAB 2001)
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7. *Maker's Mark Distillery, Inc. v. Diageo N. Am.*, 102 USPQ2d 1693 (6th Cir. 2012)

CERTIFICATE OF TRANSMISSION

I hereby certify that on February 18, 2014, the foregoing Appeal Brief was filed electronically with the Trademark Trial and Appeal Board.

/Laura M. Konkel/
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